(3)

No. 05-5966

IN THE

# Supreme Court of the United States

ERIC MICHAEL CLARK,
*Petitioner*,

v.

STATE OF ARIZONA,
*Respondent*.

**On Writ of Certiorari to the Arizona Court of Appeals**

## BRIEF *AMICUS CURIAE* FOR THE AMERICAN PSYCHIATRIC ASSOCIATION, AMERICAN PSYCHOLOGICAL ASSOCIATION, AND AMERICAN ACADEMY OF PSYCHIATRY AND THE LAW SUPPORTING PETITIONER


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## INTEREST OF AMICI CURIAE

The American Psychiatric Association, with more than 36,000 members, is the Nation's leading organization of physicians that specialize in psychiatry. The American Psychological Association, with more than 155,000 members and affiliates, is the major association of psychologists in the United States. The American Academy of Psychiatry and the Law (AAPL), with roughly 2000 psychiatrist members, focuses on the intersection of psychiatry and the law, a subspecialty of psychiatry recognized by the Accreditation Council of Graduate Medical Education. All three organizations have participated in numerous cases in this Court. They and their members have a strong interest in one of the core matters of forensic psychiatry and psychology: the relevance of serious mental disorders to criminal punishment—specifically, their relevance both to the nearly universal insanity defense and to the intent elements of serious crimes. *See, e.g.*, Amer. Psychiatric Ass'n, *The Insanity Defense* ("*1982 Position Statement*"), Doc. No. 820002, and *Insanity Defense*, APA Doc. No. 85003 (1985 discussion with American Medical Association of latter's position, at the time, that mental-disorder evidence should be considered solely in adjudicating *mens rea* elements of offenses), available at www.psych.org/public_info/libr_publ/position.cfm.[1]

## STATEMENT

Until 1994, Arizona "uniformly adhered to" the historical test for insanity that had been articulated in *M'Naghten's Case* in Great Britain in 1843 and had been followed in Great Britain even in the 18th Century. *See State v. Schantz*, 98 Ariz. 200, 206-07 (1965). As codified in 1977, the test

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[1] No one but amici and their counsel authored, or made a monetary contribution to the preparation or submission of, this brief. Sup. Ct. R. 37.6. Both parties have filed blanket consent letters with the Clerk.

precluded criminal conviction if the defendant suffered from a mental disease or defect that meant he did not know the nature and quality of the act, or did not know that what he was doing was wrong. *Id.*; *see State v. Mott*, 187 Ariz. 536, 541 (1997) ("'A person is not responsible for criminal conduct by reason of insanity if at the time of such conduct the person was suffering from such a mental disease or defect as not to know the nature and quality of the act or, if such person did know, that such person did not know that what he was doing was wrong.'").

As of 1994, the Arizona legislature altered its insanity defense. It provided for a verdict of "'guilty except insane if at the time of the commission of the criminal act the person was afflicted with a mental disease or defect of such severity that the person did not know the criminal act was wrong.'" Pet. App. A at 10-11 (¶ 24, quoting Ariz. Rev. Stat. § 13-502(A)). The defendant carries the burden of proof by clear and convincing evidence. *Id.* (citing Ariz. Rev. Stat. § 13-502(C)).[2]

The Arizona legislature also has defined the crime of first degree murder to cover "intentionally or knowingly killing a law enforcement officer who is in the line of duty." Pet. App. A at 5 (¶ 11); *id.* at 6 n.5 ("A.R.S. § 13-1105(A)(3) provides in relevant part that a person commits first degree murder if: 'Intending or knowing that the person's conduct will cause death to a law enforcement officer, the person causes the death of a law enforcement officer who is in the line of duty.'").

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[2] This statute provides for a "guilty except insane" verdict, rather than the previous verdict of no criminal responsibility by reason of insanity. Petitioner has not raised any issue about that change, which may be of more nominal than practical importance, and so this brief assumes *arguendo* that the "guilty except insane" verdict is the equivalent of a verdict of not guilty by reason of insanity, and it addresses only the content of the standard for making the determination.

Petitioner Eric Clark was arrested for and charged with committing that crime on June 21, 2000. He was found incompetent to stand trial and spent several years under civil commitment and medical care, *see* 4/28/03 Letter from Dr. Morenz at 3-4, which included treatment with antipsychotic medication. 8/22/03 Tr. 29 (noting Clark was taking Haldol); 7/12/03 Letter from Dr. Morenz at 1, 6. Thereafter his competence was found to have been restored, 4/28/03 Letter from Dr. Morenz at 4, and he was tried on the murder charge.

The judge, who was the trier of fact, stated early in the proceeding that the State Supreme Court's decision in *Mott* precluded consideration of expert evidence on Clark's mental disorder in deciding whether the State met its burden of proving the *mens rea* element of the crime. The trial court thus allowed Clark to present his mental-disorder evidence but proposed to consider it only in deciding whether Clark met his burden of proving insanity. Resp. App. C at 5-6; Pet. App. A at 13 (¶ 31) (court of appeals summary of trial court ruling). At the trial, as the Arizona Court of Appeals stated, "[n]either party disputed the fact that Clark was suffering from a mental disease, paranoid schizophrenia, at the time of the murder, and that he had suffered from it for quite some time." Pet. App. A at 11 (¶ 26).

The trial court found for the State and against Clark. In its "special verdict," the court addressed two matters. It first found "beyond a reasonable doubt that the Defendant Eric Clark shot and caused the death of Police Officer Jeff Moritz." Resp. App. F at 1-2. The court did not state a specific finding of the *mens rea* element of the crime, though it is not disputed that the crime required at least knowledge that the shooting victim was a police officer. *See* Pet. App. A at 18-19 n.13 (court of appeals noting that "[t]he *mens rea* requirement for this crime was defined statutorily"); Br. in Opp. 7 & n.2.

The trial court then addressed the insanity defense. Resp. App. F at 2-5. It found the element of mental disease proved: "Both experts, all lay witnesses, and the attorneys agree that the Defendant suffers from a qualifying mental disease: paranoid schizophrenia"; and the State's expert testified that "'[t]here seems to be little doubt that on June 21, 2000, the Defendant was suffering from paranoid delusions.'" *Id.* at 3. But the court found that Clark had not proved the second component of the defense by clear and convincing evidence: that his "mental illness . . . distort[ed] his perception of reality so severely that he did not know his actions were wrong." *Id.* at 5.

On appeal from the guilty verdict, the Arizona Court of Appeals affirmed. Pet. App. A. It found sufficient evidence to support the inference that Clark knew that he was shooting a police officer. *Id.* at 8-10 (¶¶ 17-21). It also found no abuse of discretion in the trial court's determination that Clark did not prove insanity by the required clear and convincing evidence. *Id.* at 10-13 (¶¶ 22-30).

The court rejected Clark's contention that his due process rights were violated by Arizona's restriction of its insanity defense to circumstances where the defendant fails to know his actions are wrong, whereas the traditional standard speaks also of failure to know the "nature and quality" of the act. *Id.* at 15-16 (¶¶ 36-38). The court rejected, too, Clark's contention "that the trial court erred in refusing to consider evidence of his mental disease or defect in determining whether he had the requisite *mens rea* to commit first-degree murder." *Id.* at 18 (¶ 43). After noting that Clark was allowed to *present* such evidence, the court concluded that the trial court, and it, were bound by the State Supreme Court's decision in *Mott*, "which held that 'Arizona does not allow evidence of a defendant's mental disorder short of insanity either as an affirmative defense or to negate the *mens rea*

element of a crime.'" *Id.* at 19 (¶ 44) (quoting *Mott*, 187 Ariz. at 541) (footnote omitted).

## INTRODUCTION AND SUMMARY OF ARGUMENT

Two questions are presented, and while they raise distinct issues, they are related. One question is the procedural-due-process question of whether a State may define a crime and then categorically preclude consideration of relevant, reliable, non-prejudicial, non-privileged evidence that may negate the State's proof of an element of that crime. The other question, essentially a matter of substantive due process, is what conditions of "insanity" constitutionally preclude serious criminal punishment. We discuss them in the order indicated because the resolution of the second might depend on the resolution of the first.

**I.** This Court should hold that a categorical preclusion of consideration of mental-disorder evidence on the *mens rea* elements of the crime charged—here, intentional or knowing killing of a police officer—is unconstitutional. A fundamental due process right is the right to present relevant, reliable, non-prejudicial, non-privileged evidence to negate the State's effort to prove the elements of the crime beyond a reasonable doubt. Mental-disorder evidence, in relation to *mens rea* elements of the sort at issue in this case, comes within that right. And there is no apparent justification sufficient to support Arizona's categorical exclusion of such evidence. Once a State has defined the *mens rea* elements of the crimes charged, it may not secure convictions by a wholesale bar on considering mental-disorder evidence – which the legal system pervasively recognizes as reliable and thus depends on—when it bears on whether those elements are actually present. Reversal and remand for new trial-court findings are required on this ground.

**II.** As to the insanity defense, *amici*'s principal submission is that substantive due process analysis strongly supports a constitutional threshold. In particular, as relevant here,

history and overwhelming current practice support a constitutional rule that precludes serious criminal punishment of one who, because of a mental disease, lacked rational appreciation of the wrongfulness of his conduct when engaging in it. That rule reflects longstanding and still-pervasive principles that set preconditions for serious criminal culpability.

**III.** How that principle applies here (and would be applied on a remand after reversal under Argument I) is not perfectly certain. With no dispute here that Clark has a serious mental disease, the question concerns only the remaining statutory requirement of knowledge of wrong. Although Arizona in 1994 deleted separate "nature and quality" language from its statute, the knowledge-of-wrong standard on its face can be understood itself to demand rational appreciation of the nature and quality of the act, and that understanding is reflected in the state appellate court's opinion in this case (and to some extent in the trial court's opinion). That sensible understanding would render Arizona's law constitutional. On the other hand, if Arizona's law were to be applied narrowly, a constitutional issue would arise. Even then, however, for a case involving a specific-intent crime, the standard *could* be valid as applied if (as we argue) the trier already were required to consider mental-disorder evidence on the *mens rea* elements of the crime, and in doing so found knowledge of the nature and quality of the act as part of the affirmative proof of the crime, leaving no such issue for a separate insanity defense.

## ARGUMENT

A practical aspect of the relation between the two questions presented, the defense and affirmative-element issues, is worth bearing in mind from the outset. A defendant's failure to meet *his* burden of proving insanity (here, by clear and convincing evidence) would not mean that the State, even on the very same evidence, necessarily can meet *its* burden of proving intent beyond a reasonable doubt. That would be so

even if the substance of the inquiries were identical, but, in fact, there might well be differences in the inquiries, depending on precisely what meaning is given to insanity (here, knowledge of wrong) and *mens rea* (here, knowing killing of a police officer). The essential point is that it matters how the trier must adjudicate the intent elements the State must prove, regardless of the insanity conclusion, and we begin with the intent issue.

## I. Due Process Prohibits A State From Categorically Barring Consideration Of Evidence Of Mental Disorders Relevant To The Intent Element Of The Charged Crime

**A.** As interpreted and applied in this case, the Arizona Supreme Court decision in *State v. Mott*, 187 Ariz. 536 (1997), held that Arizona law categorically prohibited a trier of fact in a criminal case from considering mental-disorder evidence in deciding whether the State met its burden of proving a required *mens rea* element of the offense it charged, even if such evidence otherwise met the usual standards of relevance and reliability and could not be tagged as breaching privileges or causing prejudice to accurate assessment of the factual questions raised by the criminal charge. It held, too, as Arizona acknowledges here, that the federal Constitution permitted that prohibition. *See Mott*, 187 Ariz. at 541-45; Br. in Opp. 9 ("*Mott* rejected a due process claim"). That ruling thus resolved both the state-law and federal-law issue of whether the defendant had a right to have such evidence considered.

Clark's second question here challenges the federal-law aspect of *Mott*. The question is not whether evidence must be *admitted*—Clark does not appear to have been restricted in *presenting* evidence—but whether the State may categorically forbid its *consideration*, even if relevant, reliable, non-prejudicial, and not privileged. In this case, there is no reliable indication that the trial court considered the mental-

disorder evidence in deciding whether the State met its burden of proving that Clark had the requisite intent to kill a police officer.[3]

Clark strongly appears to have preserved his challenge on this federal due process ground.[4] And the Arizona Court of Appeals did not reject the challenge on an adequate and independent state ground, procedural or factual. It made no determination that a claim to consideration of the mental-disorder evidence had been waived or that such consideration would make no difference to any reasonable finder of fact in assessing the State's proof of *mens rea*.

The court of appeals said: "Aside from the evidence offered to prove his insanity generally, Clark specified no evidence in his offer of proof that demonstrated he was not capable of knowing he was killing a police officer. Even assuming such evidence was sufficient, the trial court was bound by the supreme court's decision in *Mott* . . . ." Pet.

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[3] The trial court said at the outset that it read *Mott* to bar such consideration, Resp. App. C at 5-6, and it never spoke to the contrary. Nor does the court's "special verdict" (Resp. App. F) show consideration of the evidence on the criminal intent issue. The court did not separately discuss the intent element of the crime charged (though the trial court presumably found that element implicitly), and it discussed the mental-disorder evidence only in its analysis of the insanity defense, where the defendant had the burden of proof. *Id.* at 2-5. Even in its insanity discussion, moreover, the court did not find as a fact (under any burden of proof) that Clark was aware that Officer Moritz was a police officer. All the court said was that it "considered the following *evidence*: ... that the Defendant was aware that Officer Moritz was a police officer." *Id.* at 4 (emphasis added).

[4] Arizona, in opposing certiorari, extensively argued waiver of this challenge, but the Court granted review. The trial court stated early on that it was bound by *Mott* to disregard mental-disorder evidence in deciding whether the State proved the required intent to kill a police officer, *see* Resp. App. C at 5-6, and Clark in turn challenged the soundness of *Mott*. Because *Mott* resolved the federal due process question, Clark's challenge to *Mott* raised the federal-law issue.

App. A at 19 (¶ 44). That statement makes no procedural-default point: indeed, it appears to treat "the evidence offered to prove [Clark's] insanity generally" as itself constituting an "offer of proof" for purposes of the intent element. *Id.* ("*Aside from* the evidence offered to prove his insanity generally, . . .") (emphasis added). The statement also falls at least three steps short of making any factual finding that could moot consideration of the claim of federal right to have the evidence considered in assessing the State's effort to carry its burden of proving *mens rea* beyond a reasonable doubt. First, it does not deny that the "evidence offered to prove his insanity" could suffice to establish that Clark was not even "capable" of knowing that he was killing a police officer. Second, it does not address whether that evidence could show that he *in fact did not know* that he was killing a police officer (even if he was capable of so knowing). Third, it says nothing on the directly pertinent question: might the evidence have led to a finding that *the State had not met its burden* of proving *mens rea* beyond a reasonable doubt? That is a separate matter from whether, as the court of appeals held, there was sufficient evidence from which a finding of knowingly killing a police officer *could* be made. *Id.* at 8-10 (¶¶ 17-21). Accordingly, *Mott*'s categorical prohibition on considering mental-disorder evidence relevant to *mens rea*, as relied on by the Arizona courts, is before this Court.

**B.** That prohibition does not withstand constitutional analysis under several closely related core principles of due process. A State must prove every element of the charged crime beyond a reasonable doubt, *In re Winship*, 397 U.S. 358 (1970), and cannot shift the burden of proof on a required element of mental state. *Sandstrom v. Montana*, 442 U.S. 510 (1979). Even more fundamentally, an "essential component of procedural fairness is an opportunity to be heard," and that guarantee creates a constitutional presumption against "exclud[ing] competent, reliable evidence . . .

when such evidence is central to the defendant's claim of innocence." *Crane v. Kentucky*, 476 U.S. 683, 690 (1986). The presumption can be overcome only by affirmative justification "closely examined" on judicial review to ensure protection of what surely lies at the very core of due process: the right to present evidence "to defend against the State's accusations." *Chambers v. Mississippi*, 410 U.S. 284, 295, 294 (1973); *cf. United States v. Scheffer*, 523 U.S. 303, 308 (1998) (plurality opinion recognizing "defendant's right to present relevant evidence," "subject to reasonable restrictions"). In accordance with such fundamental principles, the Court explained in *Martin v. Ohio*, 480 U.S. 228, 233-34 (1987), that it would be a violation of the *Winship* principle for a State to preclude a jury's consideration of self-defense evidence "in determining whether there was a reasonable doubt about the State's case."

In *Montana v. Egelhoff*, 518 U.S. 37 (1996), Justice O'Connor, joined by Justices Stevens, Souter, and Breyer, summarized the principles of *Crane*, *Chambers*, *Washington v. Texas*, 388 U.S. 14 (1967), and other decisions:

> These cases, taken together, illuminate a simple principle: Due process demands that a criminal defendant be afforded a fair opportunity to defend against the State's accusations. Meaningful adversarial testing of the State's case requires that the defendant not be prevented from raising an effective defense, which must include the right to present relevant, probative evidence. To be sure, the right to present evidence is not limitless; for example, it does not permit the defendant to introduce any and all evidence he believes might work in his favor, nor does it generally invalidate the operation of testimonial privileges. Nevertheless, "an essential component of procedural fairness is an opportunity to be heard. That opportunity would be an empty one if the State were permitted to exclude competent, reliable evidence" that is essential to the accused's defense.

> [The Montana law at issue] forestalls the defendant's ability to raise an effective defense by placing a blanket exclusion on the presentation of a type of evidence that directly negates an element of the crime, and by doing so, it lightens the prosecution's burden to prove that mental-state element beyond a reasonable doubt.

*Egelhoff*, 518 U.S. at 63-64 (O'Connor, J., dissenting) (internal citations omitted). Justice Ginsburg, who provided the critical vote in the case, did not disagree with the foregoing due-process principles, but only their application; she concluded that they were not impaired by the Montana law, a tradition-based treatment of voluntary intoxication that effectively redefined the crime. 518 U.S. at 58-59.

**C.** The *Mott* preclusion of judicial consideration of mental-disorder evidence strikes at the heart of the foregoing due process guarantees.[5] It deprives the defendant of the right to consideration of evidence that may directly undermine any inference of the requisite intent—here, intent to kill a person knowing that the person is a police officer. Evidence of psychotic delusions can bear directly on that issue, indeed may be virtually the sole evidence the defendant has available on that issue. Precluding its consideration thus strips the defendant of the constitutionally guaranteed opportunity to present a defense, which *Martin* adds is essentially an extreme form of relieving the State of the burden of proof it constitutionally must bear.

For this reason, when Congress codified the federal insanity defense, 18 U.S.C. § 17, it left undisturbed the general right of the defendant to have mental-disorder evidence considered on the affirmative elements of the offense. "Both

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[5] Both the procedural due process and substantive due process analyses in this brief have their counterparts in analyses applicable to mental retardation (embraced within the traditional "mental disease or defect" formulation of the insanity defense). That situation is not otherwise addressed in this brief, because it is not presented in this case.

the wording of the statute and the legislative history leave no doubt that Congress intended, as the Senate Report stated, to bar only alternative 'affirmative defenses' that 'excuse' misconduct[,] not evidence that disproves an element of the crime itself.'" *United States v. Pohlot*, 827 F.2d 889, 897 (3d Cir. 1987).[6] And it did so after the Attorney General recognized the need to preserve consideration of such evidence in adjudicating *mens rea*:

> "Under any approach, the Government will always be required to prove every element of the statutory offense that is charged. This includes any specific intent or knowledge required by the statute. In the rare case, therefore, in which a defendant is so deranged that, for example, he did not know that he was shooting a human being, one of the elements of the offense could not be proved—the mental element of *mens rea*—and *he could not be convicted* under current law or *under any constitutionally supportable change in the law*."

*Id.* at 902 (quoting testimony of Attorney General William French Smith) (emphasis added).

Expert evidence about mental disorders, pervasively treated as reliable and in fact relied on in our legal system, can bear directly on *mens rea* questions. For example, the delusions that are one defining characteristic of schizophrenia

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[6] Fed. R. Crim. P. 12.2 explicitly contemplates the introduction of evidence on mental disorder for adjudication of elements of the crime. On the other hand, Fed. R. Evid. 704(b) places a limit on statements by experts on the "ultimate issues" of whether the defendant had "the mental state or condition constituting an element of the crime." The latter has generally been construed, consistent with its language and the underlying general constitutional right to present relevant and reliable evidence, to bar only expert statements on the ultimate issue, not expert evidence that might lead the trier of fact to draw inferences about the ultimate issues. *See, e.g., United States v. Bennett*, 161 F.3d 171, 183 & n.4 (3d Cir. 1998) (reviewing various circuit-court decisions); *United States v. Schneider*, 111 F.3d 197, 201 (1st Cir. 1997).

affect an individual's beliefs and, hence, the individual's understanding of what he is doing and, hence, his knowledge, intent, or purposes. *See* Amer. Psychiatric Ass'n, *Diagnostic and Statistical Manual of Mental Disorders* 299, 313-14 (4th ed. Text Revision 2000) ("*DSM-IV-TR*"). If the defendant is so delusional that he does not know that he is killing, or that the person at whom he is aiming is a police officer (or even a human being), he does not, in fact, have the intent required by the definition of the crime by its plain terms. To forbid consideration of the expert evidence of such delusions, and all serious cognitive impairments, is to blind the trier of fact to relevant, reliable, non-prejudicial evidence and to produce false factual findings in some cases. *See Ake v. Oklahoma*, 470 U.S. 68, 79 (1985) ("a State may not legitimately assert an interest in maintenance of a strategic advantage over the defense, if the result of that advantage is to cast a pall on the accuracy of the verdict obtained").

In the present case, the State had to prove knowing killing of a police officer, and there was expert mental-disorder evidence pointing to the absence of such *mens rea*. It was undisputed that Clark was suffering from a serious psychotic illness at the time of his acts. 8/22/03 Tr. 61 (State: "the state has not and does not intend to challenge the fact that the defendant suffers from a mental illness or a mental defect, and that it's most likely schizophrenia paranoid type"); Pet. App. A at 11 (¶ 26). And Clark's psychiatric expert concluded: "It is not known what Mr. Clark was thinking or perceiving at the time of the alleged offense, but given that he was very psychotic before and after the alleged offense, it is reasonable to infer that his perception[] of what was transpiring at the time of the alleged offense was probably bizarre and a distortion of reality; thus, there [is] considerable evidence that indicates Mr. Clark probably did not know his acts were wrong at the time of the alleged offense." 8/22/03 Tr. 101-102 (Resp. App. D), quoting 7/12/03 Letter from Dr. Morenz at 7 (referred to as "report," Defense Exhibit 5A,

8/22/03 Tr. 38).[7] Clark's delusional beliefs, in fact, were one key premise of the undisputed diagnosis of schizophrenia, paranoid type. *DSM-IV-TR* 313-14.

There is no occasion for this Court to say what a trier of fact in this case would make of the evidence of mental disorder and its symptoms, including delusions, when considered among all the pertinent evidence. Nor is there a dispute about trial courts' general authority to find particular mental-disorder evidence in a particular case insufficiently probative on a particular *mens rea* issue to warrant admission. The sole issue is whether a State may categorically preclude a trier of fact, when adjudicating criminal guilt, from even

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[7] *See also* 8/22/03 Tr. 36 (probable that Clark was insane); 37 (Clark suffers from paranoid schizophrenia); 38 (psychotic from months before the shooting); 25, 29, 32, 39, 43, 47-48, 72 (describing Clark's delusions about some people being aliens and "difficulty perceiving reality as you and I see it"); 47 (expert "can't imagine" that Clark was trying to lure police officer to ambush him); 55 (fact that Clark "wasn't shouting expletives, you know, at strangers in the theater or at the restaurant [before the killing] does not mean that he was not still believing that people were aliens, that people were trying to poison him, and that very strange and malevolent things were transpiring around him. ... In fact, I think there's a lot of reason to think that all those beliefs were still very much present, still affecting his behavior, and probably had a major impact and influence in a major way on what he did when he killed the policeman."); 59 ("no one knows exactly what was on Eric's mind, but given how psychotic he was before and immediately after and everything we know about schizophrenia, I think that it is fair and probable that he did not understand what he was doing was, you know – that they did not understand right from wrong"); 73 ("it does seem that he was experiencing some external forces that were communicating with him [through television and radio and license plates] and might have been influencing his behaviors"); 88-89, 110-112 (expert reached his conclusion even after considering testimony that weeks earlier Clark had said he was going to lure a police officer by firing a gun into the air); *see also* 7/22/03 Letter from Dr. Moran, Ph.D., State's expert, at 44 (post-arrest statements by Clark about aliens).

considering mental-disorder evidence bearing on a required *mens rea* element (here, knowing killing of a police officer).

**D.** There is no apparent justification sufficient to support Arizona's categorical bar with its severe potential impairment of defendant's due process rights. *See* 2 American Bar Ass'n, *Standards for Criminal Justice* p. 7-291 (2d ed. 1986) ("rulings excluding [expert testimony on *mens rea*] are constitutionally infirm"). To begin with, for a mental disease like the paranoid schizophrenia at issue here, the key policies behind the rule for voluntary intoxication at issue in *Egelhoff* are starkly absent. In the present setting, there simply cannot be any question about blameworthiness for voluntarily creating a state of mind where *mens rea* is lacking, or about a State's interest in deterring self-created impairments. *See* note 10, *infra* (noting age-old distinction between voluntary intoxication and mental disorder).

Expert evidence of mental disorders, presented by qualified professionals and subject to adversarial testing, is both relevant to the mental-state issues raised by *mens rea* requirements and reliable. It is not infallible, of course. It is only the best that human study, based on clinical experience and scientific research, has to offer on mental-state issues. Such evidence could not be condemned wholesale without unsettling the legal system's central reliance on such evidence in dealing with mental-state issues in criminal, civil-commitment, and numerous other settings. Even insanity, moreover, rarely becomes an unresolvable battle of experts: "consensus on the nonresponsibility issue is commonplace." *ABA Standards* p. 7-306.

The general reliability and frequent centrality of expert evidence on mental disorders, applied to a criminal defendant's right to "a fair opportunity to present his defense," are the very premises of this Court's ruling that defendants asserting insanity (or facing the death penalty if future dan-

gerousness has been placed in issue) have a constitutional right to a State-funded mental-health expert, akin to the constitutional right to a State-funded attorney. *Ake*, 470 U.S. at 76. Based on "the pivotal role that psychiatry has come to play in criminal proceedings" (*id.* at 79), the Court ruled:

> when the State has made the defendant's mental condition relevant to his criminal culpability and to the punishment he might suffer, the assistance of a psychiatrist may well be crucial to the defendant's ability to marshal his defense. In this role, psychiatrists gather facts, through professional examination, interviews, and elsewhere, that they will share with the judge or jury; they analyze the information gathered and from it draw plausible conclusions about the defendant's mental condition, and about the effects of any disorder on behavior; and they offer opinions about how the defendant's mental condition might have affected his behavior at the time in question. . . . Unlike lay witnesses, who can merely describe symptoms they believe might be relevant to the defendant's mental state, psychiatrists can identify the "elusive and often deceptive" symptoms of insanity, *Solesbee v. Balkcom,* 339 U.S. 9, 12 (1950), and tell the jury why their observations are relevant. Further, where permitted by evidentiary rules, psychiatrists can translate a medical diagnosis into language that will assist the trier of fact, and therefore offer evidence in a form that has meaning for the task at hand. Through this process of investigation, interpretation, and testimony, psychiatrists ideally assist lay jurors, who generally have no training in psychiatric matters, to make a sensible and educated determination about the mental condition of the defendant at the time of the offense.

*Id.* at 80-81. That analysis is properly stated in terms relevant not only to insanity itself but more generally to "mental condition relevant to . . . criminal culpability." *Id.* at 80.

Nor can *Mott* be justified by reference to the few other well-founded justifications for excluding evidence that might otherwise be relevant and reliable. There is no apparent basis for categorically considering such evidence to be confusing, misleading, or otherwise prejudicial to an accurate assessment of *mens rea* matters. Indeed, such evidence, given its provenance in expert study and experience, is more, not less, important than other types of evidence to making the best determination of *mens rea* matters. Wholesale preclusion, moreover, can hardly be justified on grounds of cumulativeness.[8]

*Mott*'s rule, moreover, finds no justification in the policies underlying privilege law. Privileges are of ancient origin and reflect deliberate, experience-based determinations that it is vital "to encourage effective communications within certain relationships." *Egelhoff*, 518 U.S. at 67 (O'Connor, J., dissenting). And the evidence excluded by privileges may not even exist without them, for the communication may never have been made if not protected from disclosure. *Jaffee v. Redmond*, 518 U.S. 1, 11-12 (1996). The deeply rooted policies behind evidentiary privileges offer no support for categorical preclusion of consideration of reliable, non-prejudicial mental-disorder evidence relevant to a mental-state element of a crime.

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[8]As noted, particular mental-disorder evidence might be found insufficiently relevant to particular issues of purpose, intent, or knowledge in particular cases. In *Fisher v. United States*, 328 U.S. 463 (1946), a divided Court upheld a refusal of the trial court, as a matter of District of Columbia law, to give a special instruction that certain mental-disorder evidence should be considered in distinguishing first- and second-degree murder, apparently concluding that the evidence did not sufficiently bear on the legal elements distinguishing those offenses. Even in *Fisher*, the jury was instructed on the *mens rea* elements, with no bar on considering the mental-disorder evidence. Fisher presented no due process question, and the decision pre-dates this Court's subsequent elaboration of the rights to present a defense and to have the State prove the elements of the crime beyond a reasonable doubt.

The problems with this preclusion extend beyond the unjustified impairment of the individual defendant's rights in the criminal trial. The preclusion means that defendants who do not in fact come within a criminal prohibition's terms, even as judicially construed, may nevertheless be convicted of violating the prohibition. That result, certainly in a State like Arizona that has no common-law crimes, violates the due process guarantee of fair warning. *See Rogers v. Tennessee*, 532 U.S. 451, 457-58 (2001); *United States v. Lanier*, 520 U.S. 259, 266 (1997).[9]

At the same time, the result is to undermine democratic accountability for the legislature's calibration of how serious a crime particular conduct constitutes, and how severe the punishment should be, within an overall scheme of criminal penalties for a variety of conduct of disparate seriousness. The processes of legislative deliberation, and of public assessment of the resulting determinations, can break down when a criminal proscription is applied (because of a preclusion rule like Arizona's) to conduct that does not in fact come within it. Conduct that has not actually been legislatively determined to warrant the criminal punishment being applied is being subjected to that punishment. The result is a kind of masquerade from the legislature's and electorate's points of view, undermining the "[t]ransparency [that] is essential to maintaining public respect for the criminal justice system, ensuring its integrity, and protecting the rights of the accused." *Smith v. Doe*, 538 U.S. 84, 99 (2003).

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[9] Common-law crimes are, generally speaking, "utterly anathema today" (*Rogers*, 532 U.S. at 476 (Scalia, J., dissenting)), and in Arizona they have specifically been abolished. *See State v. Lopez*, 174 Ariz. 131, 141 (1992) ("there were and are no common law crimes in Arizona"); *State v. Cotton*, 197 Ariz. 584, 586-87 (Ct. App. 2000) (discussing Ariz. Rev. Stat. § 13-103: "Although there are no longer common law crimes in Arizona, the legislature continued in force the established common law meanings of terms used in the criminal statutes.") (footnote omitted).

## II. Substantive Due Process Analysis Strongly Supports A Rule Barring Serious Criminal Punishment Of A Defendant Who, Because Of Mental Disorder, Lacked A Rational Appreciation Of The Wrongfulness Of His Conduct

**A.** Substantive due process analysis governs how a State may define the substantive bases for criminal punishment. The inquiry is whether the law "'offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.'" *Egelhoff*, 518 U.S. at 58 (Ginsburg, J., concurring in the judgment) (quoting *Patterson v. New York*, 432 U.S. 197, 202 (1977)); *id.* at 43 (plurality opinion); *id.* at 71 (dissenting opinion).

In *Egelhoff* Justice Ginsburg provided the critical fifth vote for upholding a Montana statute that precluded proof of voluntary intoxication to negate *mens rea*, viewing the rule as essentially redefining the *mens rea* element of crimes. *Id.* at 58-59. In upholding the law, Justice Ginsburg, together with the plurality, relied on "the lengthy common-law tradition" supporting that rule, together with "the adherence of a significant minority of the States to that position." *Id.*; *see id.* at 43-49 (plurality opinion). The insanity defense, at issue here, is a quite different matter under that analysis.[10]

**B.** There is a strong constitutional basis for precluding serious criminal punishment of a defendant who, because of a

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[10] As far back as Lord Coke, the common law distinguished a "lunatic that hath sometime his understanding, and sometimes not," who is "*non compos mentis*, so long as he hath not understanding," from one who "by his own vicious act for a time depriveth himself of his memory and understanding, as he that is drunken," a "kind of *non compos mentis* [that] shall give no privilege to him or his heirs." Quoted in Quen, *Anglo-American Criminal Insanity: An Historical Perspective*, 2 Bulletin Amer. Acad. Psychiatry & L. 115, 116 (1974). *See also* 4 W. Blackstone, *Commentaries on the Laws of England* 24-26 (1979 facsimile of 1769 edition) (making same distinction).

mental disorder, lacks rational appreciation of the wrongfulness of his conduct. The formulations of the legal tests for insanity have varied over the years, and all the formulations have presented challenges: sometimes there are difficulties in application; sometimes debate about the meaning of terms; sometimes imperfection in precisely capturing underlying notions of culpability. But the presence of variations and imprecisions should neither obscure the common core nor preclude constitutional recognition of that core as a requirement for serious criminal punishment. After all, "the Constitution's safeguards of human liberty in the area of mental illness and the law are not always best enforced through precise bright-line rules." *Kansas v. Crane*, 534 U.S. 407, 413 (2002).

The plurality in *Egelhoff* stated that the "primary guide in determining whether the principle in question is fundamental is, of course, historical practice." 518 U.S. at 43 (plurality opinion). Our legal tradition has long and pervasively precluded serious criminal punishment when acts result from mental disorders that impair the understanding of one's acts relevant to culpability (blameworthiness). A formulation that can capture the common core of that tradition, and hence strongly supported as a constitutional requirement, is that serious criminal punishment is barred when a mental disease deprives the defendant of rational appreciation of the wrongfulness of his conduct at the time of the conduct.

Various sources trace the history of an insanity defense. *E.g.*, S. Brakel, J. Parry, & B. Weiner, *The Mentally Disabled and the Law* 707-19 (American Bar Foundation 3d ed. 1985); *ABA Standards* pp. 7-287 to 7-290, 7-295 to 7-299; Quen, *supra*; Giorgi-Guarnieri, *et al.*, *AAPL Practice Guideline for Forensic Psychiatric Evaluation of Defendants Raising the Insanity Defense*, 30 J. Amer. Acad. Psychiatry & L. No. 2, Suppl. (2002). The notion that a certain level of understanding is a precondition to the culpability required for

criminal punishment has ancient roots. *E.g.*, *ABA Standards* pp. 7-288 to 7-289 & n.8; Quen, at 115-16; *Mentally Disabled & Law* 708-09. In English law, Lord Coke wrote of the "lunatic" that "hath not his understanding" as avoiding criminal punishment, and Sir Matthew Hale in the early 18th Century wrote:

> "The consent of the will is that which renders human actions either commendable or culpable; ... where there is no will to commit an offense, there can be no transgression, or just reason to incur the penalty or sanction of that law instituted for the punishment of crimes or offenses. And because the liberty or choice of the will presupposeth an act of the understanding to know the thing or action chosen ... it follows that, where there is a total defect of the understanding, there is no free act of the will in the choice of things or actions."

Quoted in Quen, at 116; *see also ABA Standards* p. 7-289.

Blackstone explained that among those not "*capable* of committing crimes . . . or, which is all one, who are exempted from the censures of the law" are those who have a certain "want or defect of *will*," which is "the only thing that renders human actions either praiseworthy or culpable." 4 Blackstone at 20-21. The required will is missing "[w]here there is a defect of understanding. For where there is no discernment, there is no choice; and where there is no choice, there can be no act of the will, . . . : he therefore, that has no understanding, can have no will to guide his conduct." *Id.* at 21. Specifically, "a deficiency in will, which excuses from the guilt of crimes, arises . . . from a defective or vitiated understanding, *viz.* in an *idiot* or *lunatic*." *Id.* at 24.

In 1843, following an acquittal on grounds of insanity, the House of Lords articulated a standard for insanity in

*M'Naghten's Case*, 10 Cl. & F. 200, 210, 8 Eng. Rep. 718, 722 (H.L. 1843):

> [T]o establish a defence on the ground of insanity, it must be clearly proved that, at the time of the committing of the act, the party accused was labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing; or, if he did know it, that he did not know he was doing what was wrong.

*See also ABA Standards* p. 7-295; *Mentally Disabled & Law* 709. That standard, which focuses on cognitive deficiencies, "became the accepted standard in both [the United States and Great Britain] within a short period of time." *ABA Standards* p. 7-295.

Formulations of the insanity defense in the United States were not completely uniform, though departures generally broadened the defense. New Hampshire adopted a standard that inquired simply whether the otherwise-criminal act was "the offspring and product of mental disease." Quoted in *id.* p. 7-296. Other States precluded conviction not only where the *M'Naghten* cognitive-impairment test was met but also where a standard based on volitional impairment ("irresistible impulse") —inability to control oneself—was met. *Id.* From 1900 through the 1950s, *M'Naghten*'s standard governed in most jurisdictions, while about one third of the States added an irresistible-impulse test. *Id.*

In 1955, the American Law Institute (ALI) proposed a standard for non-responsibility that applied when either a cognitive or volitional defect was present:

> A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity either to appreciate

> the criminality [wrongfulness] of his conduct or to conform his conduct to the requirements of the law.

Quoted in *id.* p. 7-297. By the early 1980s, the ALI formulation, or some close variant, governed in the federal courts and in "a majority of the country's jurisdictions." *Id.*[11]

Then, prompted in significant part by John Hinckley's acquittal on grounds of insanity for shooting President Reagan, some jurisdictions reformed their law. In particular, some abandoned the volitional-impairment part of the ALI test. Thus, Congress in 1984 enacted a statute that codified the basic *M'Naghten* standard, 18 U.S.C. § 17(a):

> It is an affirmative defense to a prosecution under any Federal statute that, at the time of the commission of the acts constituting the offense, the defendant, as a result of a severe mental disease or defect, was unable to appreciate the nature and quality or the wrongfulness of his acts. Mental disease or defect does not otherwise constitute a defense.

State law continues overwhelmingly to provide for an insanity defense with at least a cognitive-defect standard, though wording varies. *See AAPL Practice Guideline* at S31-S37 (state by state survey, 2000-2001); *see also Mentally Disabled & Law* 769-777 (state by state survey, mid-1980s).

Thus, not only is the common law tradition governing insanity sharply different from the tradition regarding voluntary intoxication that was at issue in *Egelhoff*, but so too is the present state of the law. In contrast to the situation presented in *Egelhoff*, there is no "significant minority" of States (518 U.S. at 58-59 (Ginsburg, J., concurring in the judgment)) allowing serious criminal punishment of those who, because of mental disorder, lack rational appreciation of wrongfulness. In

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[11] The D.C. Circuit followed a version of New Hampshire's "product rule" from the time of *Durham v. United States*, 214 F.2d 862 (D.C. Cir. 1954), until 1972, when it adopted the ALI standard instead, *United States v. Brawner*, 471 F.2d 969 (D.C. Cir. 1972).

only five States have legislatures statutorily eliminated an insanity defense, *see AAPL Practice Guidelines* (Nevada, Kansas, Utah, Idaho, and Montana), hardly a substantial number. In one, the State Supreme Court found the elimination invalid under the state and federal constitutions, because it allowed conviction where the *mens rea* elements of crimes were not present (*Finger v. State*, 117 Nev. 548 (2001)), and the legislature has now reinstated an insanity defense. 2003 Nevada Laws Ch. 284; Nev. Stat. §§ 174.035(4), 194.010(3). In the other four States, insanity evidence still must be considered in adjudicating the *mens rea* elements of crimes. *See State v. Bethel*, 275 Kan. 456, 464-69, 473 (2003); *State v. Herrera*, 895 P.2d 359 (Utah 1995); *State v. Searcy*, 118 Idaho 632 (1990); *State v. Korell*, 213 Mont. 316 (1984). Depending on how they are defined, the *mens rea* elements of crimes may require, and thus allow mental-disorder evidence that addresses, rational appreciation of wrongfulness.

The early pronouncements quoted above (*e.g.*, of Hale and Blackstone) identify the principles underlying the longstanding tradition and continuing practice today. The insanity defense "come[s] to us as part of a tradition which makes the notion of 'desert' or 'blame' central to criminal responsibility." A. Goldstein, *The Insanity Defense* 9 (1967). "The Anglo-American legal tradition is grounded on the premise that persons are normally capable of free and rational choice between alternative acts and that one who chooses to harm another is thus morally accountable and liable to punishment. If, however, a person for any reason lacks the capacity to make rational choices or to conform his behavior to the moral and legal demands of society, traditionally he has been relieved of criminal responsibility and liability for his actions." *Mentally Disabled & Law* 707.

This Court itself has recognized that "the two primary objectives of criminal punishment [are] retribution [and] deterrence." *Kansas v. Hendricks*, 521 U.S. 346, 361-62 (1997); *see id.* at 373 (Kennedy, J., concurring) (stressing

criminal-law's functions of "retribution and general deterrence"). But retribution is dependent on having "affix[ed] culpability," and criminal culpability, and hence retribution, traditionally turn on the type of understanding required for *scienter*. *Hendricks*, 521 U.S. at 362 (concluding that absence of *scienter* supported civil character of sexual-predator-commitment statute, which is therefore not "retributive"). Without the required understanding, the retribution objective thus does not generally apply. Nor does the deterrence objective. "A person lacking the required intelligence, reasoning ability, and foresight capacity to understand the [criminal] code or its sanctions will not be deterred by them . . . ." *Mentally Disabled & Law* 707.

There are probably multiple ways to define the type of understanding that is at the core of the culpability concept in our tradition. The important substantive point is that too narrow a view—bare awareness of the physical character of one's act, or that society might view it as a bad or even unlawful act—would fail to capture the central requirement of a *rational* understanding. *Cf. Dusky v. United States*, 362 U.S. 402 (1960) ("rational understanding" standard for competence to stand trial); *see also Godinez v. Moran*, 509 U.S. 389, 396 (1993). For that reason, although *M'Naghten*'s "know" *can* be applied broadly enough, the facially broader term "appreciate" has been preferred by Congress, the American Law Institute, the American Bar Association, and the American Psychiatric Association. *ABA Standards* pp. 7-307 to 7-308 (explaining reasons). Other useful formulations that suggest the needed breadth, reflected in the "defect of reason" aspect of the *M'Naghten* standard, were suggested by Herbert Fingarette in *The Meaning of Criminal Insanity* 200, 238 (1972): "the capacity to rationally assess – define and evaluate—his own particular act in the light of the relevant public standards of wrong"; "The defect of reason must be such that the person cannot be rational with respect to (cannot respond to what is essentially relevant to) the moral-legal

status of his act." *See also Mentally Disabled & Law* 719 ("rational knowledge and understanding"); Bonnie, *The Moral Basis of the Insanity Defense*, 69 A.B.A.J. 194, 195 (1983) ("it is fundamentally wrong to condemn and punish a person whose rational control over his or her behavior was impaired by the incapacitating effects of severe mental illness").

The persistent core of insanity in our legal tradition, thus, is a cognitive impairment caused by mental disorder. And that is all that is at issue in this case. The absence in Arizona's statute of a volitional aspect of the ALI test is not, as far as amici can discern, an issue presented by Clark to this Court. Indeed, the insanity testimony by Clark's expert does not appear to present evidence bearing on incapacity for self-control in any way separate from the cognitive deficiencies that are part of the mental disease from which Clark suffered.[12]

## III. Arizona Law Comports With Substantive Due Process If It Is Broadly Enough Construed And Applied

The validity of Arizona's insanity defense depends on how broadly it is construed and applied. If its knowledge-of-wrong standard is understood, as logic suggests, itself to require rational appreciation of the nature and quality of the act, then it comports with constitutional requirements despite

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[12] Twenty years ago, the ABA and the American Psychiatric Association suggested standards that did not make separate provision for a volitional test, essentially for practical reasons—which there is no occasion in the present case to explore with whatever insight current learning would supply. *1982 Position Statement* at 5-6 (appreciation of wrongfulness standard); *ABA Standards* p. 7-299 (ABA resolution), pp. 7-304 to 7-306 (analyzing alternatives); *see also* Bonnie, *supra*; Bonnie, *Morality, Equality, and Expertise: Renegotiating the Relationship Between Psychiatry and the Criminal Law*, 12 Bull. Amer. Acad. Psychiatry & L. 5, 14-19 (1984). The ABA and the American Psychiatric Association also suggested a severity-related concept for the "mental disease" requirement.

the absence of a *separate* statement of such a requirement. Otherwise, the Arizona law in general would present a serious constitutional problem. Even that problem, however, might become harmless in a particular case if the Arizona courts had to consider mental-disorder evidence in adjudicating the *mens rea* elements, as we have argued they must.

**A.** With no dispute in this case about the presence of a serious psychosis, the sole issue is Arizona's omission from its insanity defense of a separate requirement of appreciation of the "nature and quality" of the act. But the knowledge-of-wrong standard that Arizona has adopted certainly can, and should, be understood broadly enough to make that omission unimportant. A genuinely rational appreciation of wrongfulness itself has commonly been understood to include a rational understanding of the act. *See* R. Bonnie, J. Jeffries, & P. Low, *A Case Study in the Insanity Defense: The Trial of John W. Hinckley, Jr.* 19 n.o (2d ed. 2000); Fingarette, at 200 (rational assessment involves both reasoned definition and reasoned evaluation). On that natural understanding, procedural due process itself (*see* Argument I) would require consideration of the defendant's appreciation of the nature and quality of his act.

The natural interdependence of the "wrong" and "nature and quality" components of the *M'Naghten* formulation is reflected in this Court's reference to the *M'Naghten* standard as simply a "right-wrong" test. *Powell v. Texas*, 392 U.S. 514, 536 (1968); *Leland v. Oregon*, 343 U.S. 790, 800 (1952) ("[k]nowledge of right and wrong is the exclusive test of criminal responsibility in a majority of American jurisdictions") (footnote omitted).[13] Similarly, a leading scholar re-

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[13] *Leland* held that due process allowed a State to require a defendant to prove insanity, even beyond a reasonable doubt, where the mental-disorder evidence was already available for consideration in determining whether the State had met its burden of proving all *mens rea* elements beyond a reasonable doubt.

ported in 1967 the common practice of entirely omitting the "nature and quality" language from jury charges or "treat[ing it] as adding nothing to the requirement that the accused know his act was wrong." Goldstein, at 50. Key commentary on the ALI standard's differences from *M'Naghten* do not even mention that the ALI standard states its cognitive prong solely in terms of criminality or wrong, without separate reference to the "nature and quality" of the act. *ABA Standards* p. 7-297; *Mentally Disabled & Law* 711-12; *1982 Position Statement* at 2. And the ABA and American Psychiatric Association have endorsed legal standards that use only "wrongfulness" language, without separate mention of a "nature and quality" inquiry, while adopting "appreciate" in place of "know" to emphasize the breadth of the inquiry. *See 1982 Position Statement* at 6; *ABA Standards* p. 7-294. The logic is plain: "if the accused did not know the nature and quality of his act, he would have been incapable of knowing it was wrong." Goldstein, at 50-51.

Despite the removal of the "nature and quality" language from the statutory standard in 1994, the Arizona courts in this case appear to have construed the present statute in accordance with the foregoing logic. The Arizona Court of Appeals, in rejecting Clark's constitutional attack, specifically said: "It is difficult to imagine that a defendant who did not appreciate the 'nature and quality' of the act he committed would reasonably be able to perceive that the act was 'wrong.'" Pet. App. A at 16 (¶ 38). Even the trial court, in making an insanity finding *only* about knowledge of wrong, expressly considered "evidence" that Clark knew that he was shooting a police officer, though it is also the case that the trial court did not actually make a specific finding to that effect. Resp. App. F at 4. On its face, moreover, nothing about the Arizona insanity-defense statute precludes the sensible, broad understanding under which a *separate* component addressing the "nature and quality" would be unnecessary to comport with constitutional standards.

**B.** On the other hand, if Arizona were to give its knowledge-of-wrong statute a narrow meaning, somehow to allow a finding of knowledge of wrong when the defendant has no rational understanding of what he is doing, then a real question about compatibility with our legal tradition would arise. For example, a defendant may appreciate that it is wrong to kill a household pet, but if he believes, due to a psychotic disorder, that he is killing a pet when he in fact is killing his sister, his awareness that it is wrong to kill a pet could hardly establish that he rationally appreciated the wrongfulness of his actual act. On any scale of blameworthiness consistent with our legal traditions, there is a difference of such magnitude as to break the required connection of criminal punishment to the underlying reality of moral responsibility. If Arizona were to take too narrow a view of knowledge of wrong, therefore, or if it declared a broad meaning and then forbad consideration of relevant expert mental-disorder evidence about the defendant's understanding of the nature and quality of his act, a serious due process issue would be presented.

Even in that circumstance, however, the constitutional defect could become harmless. *If* (as we argue above) the trier were already required to consider the mental-disorder evidence and upon such consideration found the knowing killing of a police officer proved by the State, the State will have proven rational knowledge of the "nature and quality" of the act, even narrowly understood, and that component could not be at issue when applying the insanity defense. What would remain regarding insanity would be whether the defendant, as a result of a mental disorder, did not know the wrongfulness of that act, whose nature and quality he has already been proven to have appreciated. Under any definition, that is what Arizona has left in its insanity defense.

## CONCLUSION

The judgment of the Arizona Court of Appeals should be reversed.

Respectfully submitted,

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